much, however, as the breach of contract consists in the refusal to pay, the only question to be determined is whether the act of the bank is tantamount to such a refusal, and it would appear unnecessary to inquire whether or not the suspension of payment was voluntary. Moreover, it is not clear why the ultimate determination of the debtor's solvency or insolvency should be decisive as to his liability for interest.[15] It follows, then, that the suspension of payment should be considered in every instance as a refusal to pay debts, and interest should therefore be allowed from that time. The opposite view was recently upheld in a New York case, *Forschirm* v. *Mechanics' & Traders' Bank* (1910) 122 N. Y. Supp. 168, on the ground that there was no act on the part of the bank excusing a demand.[16] It would seem, however, that the suspension of business was in fact equivalent to a refusal on the part of the defendant to meet its obligations, and consequently the court might properly have allowed interest from that date.

EFFECT OF PART PAYMENT BY A JOINT DEBTOR UNDER THE STATUTE OF LIMITATIONS.—Although it was decided in England as early as 1781,[1] that a part payment by one joint debtor would mark a new point from which the Statute of Limitations would commence to run on the claim against all,[2] there is no unanimity of decision on that point in the United States, and three well defined and wholly irreconcilable doctrines have received judicial approval. Some courts have followed the broad doctrine that such a part payment, whenever made, would toll the statute as to all the joint obligors;[3] some treat the payment as an acknowledgment of the debt only by the person making the payment;[4] and others apply the first rule if the payment be made before the statute becomes a bar.[5]

While the results reached in some jurisdictions might be explained by the wording of the particular statute there enacted,[6] the acts of our State legislatures have in general followed[7] the English Statute of Limitations which provided that actions should be brought "within six years next after the cause of action, and not after."[8] Since the statute was enacted partly from the desire to relieve the court from the burden of trying great numbers of ancient causes of action[9] and partly

[15]See Chemical Nat. Bank *v.* Bailey *supra.*

[16]See Sickles *v.* Herold *supra;* Patten *v.* American Nat. Bank *supra.*

[1]Whitcomb *v.* Whiting (1781) 2 Doug. 652.

[2]The broad rule stated in Whitcomb *v.* Whiting *supra* that an acknowledgment by one is an acknowledgment for all, has been modified by Lord Tenderton's Act, 9 George IV, c. 14 so that the rule now obtains only where there is a part payment.

[3]Mix *v.* Shattuck (1878) 50 Vt. 421.

[4]Exeter Bank *v.* Sullivan (1833) 6 N. H. 124; Woonsocket Inst. for Savings *v.* Ballou (1888) 16 R. I. 351; see Bell *v.* Morrison (1828) 1 Pet. 351; Van Keuren *v.* Parmelee (1849) 2 N. Y. 523.

[5]Parker *v.* Butterworth (1884) 46 N. J. L. 224; see Hooper *v.* Hooper (1895) 81 Md. 155; Schindel *v.* Gates (1877) 46 Md. 604.

[6]See Whitaker *v.* Rice (1864) 9 Minn. 13.

[7]See Walden *v.* Heirs of Gratz (1816) 1 Wheat. 292.

[8]21 Jac. I, c. 16.

[9]See Wood, Limitations 4.

to protect a debtor from an unjust demand after the evidence which would constitute a defense to an action is no longer available,[10] there would seem to be no difficulty in excepting from its operation, those cases in which there is recent evidence of a subsisting debt and in which the failure to force a settlement within the statutory period has placed the debtor under no disadvantage. It has accordingly been decided that an acknowledgment by the debtor from which a promise to pay the debt can be implied, would constitute a new point of time from which the statute would run.[11]

Inasmuch as the Statute of Limitations as generally enacted bars the remedy and not the debt,[12] the true theory of recovery where an acknowledgment is relied upon to suspend the bar of the statute would seem to require the action to be brought upon a new promise, express or implied, supported by the old consideration[13] and it would appear to be axiomatic that where there is no agency, the action could be maintained only against the person or persons actually making the acknowledgment. Since there is no agency in fact inherent in the relationship of joint obligors, a part payment by one inuring to the benefit of all by operation of law,[14] the logical application of this theory would lead to the conclusion that an acknowledgment by one joint debtor would not deprive the other of the defense of the Statute of Limitations.[15]

However difficult it may be to arrive at a contrary result on strict principle, it may well be argued that the considerations prompting the suspension of the statute where an acknowledgment is made by the debtor[16] lose none of their potency in the usual case of joint obligors and would justify the courts in holding that a part payment by one joint debtor would take the case out of the statute as to the others. As the person for whose benefit the debt was created is ordinarily unable to pay the whole immediately, harsh measures would often result in his financial distress or bankruptcy and would thus compel the payment of the entire amount by his co-debtor. The purpose of the statute would not, therefore, be defeated by excepting these cases from its operation, for, since a claim cannot be said to be stale when recent evidence of its existence is obtainable, neither the interest of the public nor that of the debtors would be advanced by a literal application of the statute. Moreover, to bring the case within the older exception would require merely the implication of an agency between the joint obligors, which is the more readily done because a payment by one necessarily operates for the benefit of all.[17]

The recent case of *McLin* v. *Harvey* (Ga. 1910) 69 S. E. 123, however, adhered to the stricter view that, irrespective of local statutes, part payment made by the plaintiff within the period of limitation would not deprive his co-surety of the defense of the statute as against

[10]Wood, Limitations 7.

[11]First Nat. Bank of Utica *v.* Ballou (1872) 49 N. Y. 155.

[12]Hulburt *v.* Clark (1891) 128 N. Y. 295; 9 COLUMBIA LAW REVIEW 554.

[13]Carshore *v.* Huyck (N. Y. 1849) 6 Barb. 583; 8 COLUMBIA LAW REVIEW 144; see Mills *v.* Wyman (Mass. 1825) 3 Pick. 207.

[14]See Bell *v.* Morrison *supra;* Willoughby *v.* Irish (1886) 35 Minn. 63.

[15]Van Keuren *v.* Parmelee *supra;* Exeter Bank *v.* Sullivan *supra.*

[16]Wood, Limitations 160.

[17]Whitcomb *v.* Whiting *supra.*

the creditor, and consequently concluded that a surety who had paid the full amount of the debt after an action against his co-surety was barred, could not compel contribution. As this right rests upon a promise implied in law based upon the equitable conception that sureties who stand in the same relation to a principal must bear equally the burdens of the situation,[18] it would seem that where the claim was no longer enforceable against one of the sureties, the equities upon which a promise could be implied would be non-existent and that the decision reached by the court is but a logical application of the doctrine of contribution.[19]

INSANITY AND THE ADEMPTION OF LEGACIES.—In determining the rights predicable upon a bequest the subject matter of which is not in existence at the death of the testator, it becomes necessary to ascertain the precise character of the gift that has been made. If it is a general legacy the doctrine of ademption, which declares that in such an event the legatee's rights are destroyed, obviously has no application for such a gift does not depend upon the continued existence of any designated thing.[1] In a like manner it is important to distinguish those cases in which the legacy may properly be termed demonstrative, as where the testator refers to a particular part of his estate only for the purpose of indicating the most convenient means by which to discharge the gift.[2] His expressions are, under such circumstances, merely descriptive of the amount and value of the bequest and the non-existence of the fund referred to cannot operate to extinguish the donee's rights.[3] To the extent, then, that it determines the exact nature of the legacy and the consequent applicability of the doctrine of ademption, the testator's intent is decisive. Although the decisions are by no means unanimous upon the question, some courts have ascribed to it an equally important role at the time when the subject matter of the gift is destroyed or converted into something else.[4] Thus it has been held that if the testator compelled payment of a debt which was the subject of a bequest the legacy was adeemed[5] whereas if such payment was voluntary on the debtor's part the legatee might still assert his right as to the proceeds of the conversion.[6] Under this theory the ultimate determination of whether or not there has been an ademption

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[18]Deering *v.* Earl of Winchelsea (1800) 2 Bos. & Pul. 270; Monson *v.* Drakeley (1873) 40 Conn. 552; see Dennis *v.* Gillespie (1852) 24 Miss. 581; Wells *v.* Miller (1876) 66 N. Y. 255; Glasscock *v.* Hamilton (1884) 62 Tex. 143; Chaffee *v.* Jones (Mass. 1837) 19 Pick. 260; Warner *v.* Morrison (Mass. 1862) 3 Allen 566.

[19]Cocke *v.* Hoffman (Tenn. 1880) 5 Lea 105; but see Bright *v.* Lennon (1880) 83 N. C. 183.

[1]See Langdon *v.* Astor's Exrs. (N. Y. 1854) 3 Duer 477.

[2]Byrne *v.* Hume (1891) 86 Mich. 546; Giddings *v.* Seward (1857) 16 N. Y. 265.

[3]Corbin *v.* Mills (Va. 1869) 19 Gratt. 438; Giddings *v.* Seward *supra;* see Morris *v.* Garlands Adm'rs. (1883) 78 Va. 215.

[4]Birch *v.* Baker (1730) Mosely 373; Partridge *v.* Partridge (1736) Cas. Temp. Talb. 226.

[5]See Coleman *v.* Coleman (1795) 2 Ves. 639.

[6]Drinkwater *v.* Falconer (1755) 2 Ves. 623; see Coleman *v.* Coleman *supra.*